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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 843

IN THE MATTER OF LEROY MILTON RAUCH, SR., DEBTOR

ARTHUR FOWLER, JR.,
Petitioner,

VERSUS

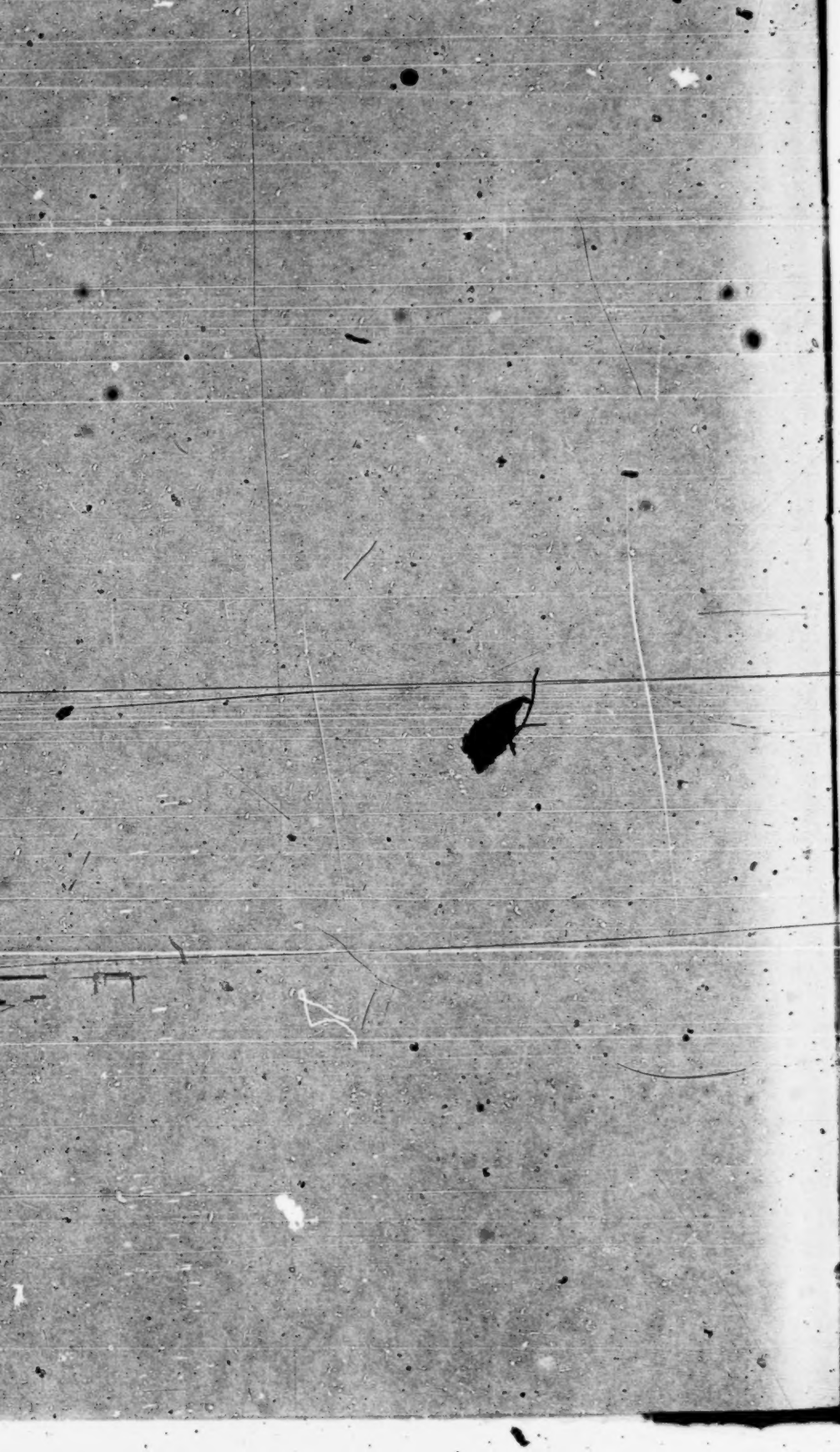
RAYBOURN H. SMISER, SR., RAYBOURN H. SMISER, JR., and ROBERT EMERY SMISER, THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, ROBERT M. BARBER, FLORENCE G. McCASLIN, B. D. LACK, Trustee, LEROY MILTON RAUCH, SR., E. R. LEDBETTER, Receiver, LEROY MILTON RAUCH, SR., Bankrupt and trustee,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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April, 1960.

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RAYBOURN H. SMISER, SR., RAYBOURN H. SMISER, JR., and ROBERT EMERY SMISER, THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, ROBERT M. BARBER, FLORENCE G. McCASLIN, B. D. LACK, Trustee, LEROY MILTON RAUCH, SR., E. R. LEDBETTER, Receiver, LEROY MILTON RAUCH, SR., Bankrupt and trustee,
Respondents.

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STATEMENT

Reference is made to the following orders and opinions:

Original order of reference to referee, filed May 14, 1953 (R. 8-9).

The initial order on the proposal for arrangement of the debtor filed by referee January 26, 1954 (R. 32-35).

The initial order denying priority on the claim of H. F. Bradburn, W. C. Allred and Arthur Fowler, Jr., filed by referee January 26, 1954 (R. 35-36). [The interest of H. F. Bradburn and W. C. Allred has been assigned to petitioner who now owns the claim in its entirety (R. 21, 26, 112-113, 55-56).]

The initial order confirming arrangement filed by referee January 26, 1954 (R. 36-39).

The initial order allowing first mortgage claim of The Mutual Benefit Life Insurance Company filed by referee January 27, 1954 (R. 44-45).

Original order dated July 11, 1955, overruling motion of E. E. Westervelt to dismiss this proceeding and to adjudicate the debtor a bankrupt and overruling the supplemental motion of Raybourn H. Smiser, as executor of the estate of E. E. Westervelt, deceased, to adjudge the debtor a bankrupt (R. 51).

Order dated July 13, 1955, vacating order of July 11, 1955, filed by referee August 5, 1955 (this document appears in the appendix).

Order, dated March 18, 1957, overruling motion to dismiss filed by Raybourn H. Smiser, executor of E. E. Westervelt, deceased, filed by referee June 10, 1957 (This document appears in the appendix in chronological order).

Order *nunc pro tunc*, dated March 18, 1957, correcting the preceding order, overruling motion to dismiss and the motion to adjudge debtor a bankrupt, filed by Raybourn

H. Smiser, executor of E. E. Westervelt, deceased, filed by referee August 2, 1957 (This document appears in the appendix in chronological order).

Order rescinding the order referring this matter to referee, appointing receiver, ordering sale of real estate, and various other matters in connection with the bankruptcy, filed September 30, 1958 (R. 60-62).

Order overruling various motions of petitioner, Arthur Fowler, Jr., and denying priority to petitioner, filed October 22, 1958 (R. 66-67).

Order overruling various motions of petitioner, Arthur Fowler, Jr., and denying priority filed October 22, 1958 (R. 67-68).

Order on hearing of receiver's report and return of sale, motion to confirm sale, petitioner's objection to confirmation of sale, denial of priority to petitioner, and various and other matters in connection with the bankruptcy filed October 29, 1958 (R. 72-74).

Opinion, United States Court of Appeals, Tenth Circuit, filed December 23, 1959 (This document appears in the appendix in chronological order).

Order denying petition for rehearing filed January 15, 1960 (This document appears in the appendix in chronological order).

Under authority of The Supreme Court Rules, Rule 23, sub-paragraph (i), petitioner having filed nine copies of the record as printed for the use of The United States Court of Appeals for the Tenth Circuit, only the pertinent opinions not contained therein are appended to the petition.

Pertinent opinions contained in the record are referred to as R. followed by the pages where the same appears in the record.

GROUNDS FOR JURISDICTION

The Opinion of the United States Court of Appeals was rendered on the 23rd day of December, 1959, dismissing the appeal and in effect affirming the orders and judgments of the United States District Court for the Western District of Oklahoma and the referee of said court. Timely petition for rehearing was filed on January 8, 1960, and denied on January 15, 1960. The time for filing petition for writ of certiorari, to-wit, 90 days from date of final judgment, began to run on January 15, 1960.

No petition for an extension of time to file petition for writ of certiorari has been filed.

A. The United States Court of Appeals, in dismissing the appeal of this petitioner, in effect affirmed and sanctioned the orders and judgment of the United States District Court for the Western District of Oklahoma and the referee of said court and in so doing has improperly:

1. Rendered a decision in conflict with the decision of another court of appeals on the same matter;

2. Decided an important question of Federal law which has not been, but should be, settled by this Court;

3. Decided a Federal question in a way in conflict with applicable decision of this Court;

4. So far departed from the accepted and usual course of proceedings, or so far sanctioned such a

departure by the United States District Court for the Western District of Oklahoma and the referee thereof, as to call for an exercise of this Court's power of supervision; and

5. Decided an important state question in a way in conflict with applicable state law.

Jurisdiction is given to this Court by the statute. Under Bankruptcy, Chapter four (4), 11 U.S.C.A., Sec. 47. JURISDICTION OF APPELLATE COURTS, Subparagraph (*c*) says:

"The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees, and orders of the United States Courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted. July 1, 1898, c. 541, § 24, 30 Stat. 553; May 27, 1926, c. 406, § 9, 44 Stat. 664; June 7, 1934, c. 426, 48 Stat. 926; June 22, 1938, C. 575, § 1, 52 Stat. 854; June 25, 1948, c. 646; § 39, 62 Stat. 992; July 7, 1952, c. 579, § 9, 66 Stat. 423."

QUESTIONS PRESENTED FOR REVIEW

Under the proceedings as outlined in Statement of the Case

1. Did the United States District Court, after the referee had denied an asserted priority, and after timely petition for review had been filed, properly deny petitioner a hearing on the merits of his petition for review?

2. Did the United States District Court exercise its discretion in passing on the motion for payment of commission in its order of October 22, 1958, when it

held that the prevailing view is that a creditor is not entitled to reconsideration of his claim by the referee if his claim has been denied an asserted priority, which ruling was erroneous and in conflict with the opinion handed down by the Tenth Circuit in the instant case and is in conflict with the decision of another Court of Appeals (*Castaner* v. *Mora*, 1 Cir., 234 F.2d 710, 714) and did the United States Court of Appeals properly dismiss the appeal of petitioner, timely taken, in which one of the points of appeal is the order of October 22, 1958, without first remanding the case to the trial court with directions to exercise its discretion (*Pfister* v. *Northern Illinois Finance Corporation*, 317 U.S. 144, 150, 87 L. Ed. 146, 151, 63 Sup. Ct. 133)?

3. Where the United States District Court on October 22, 1958, and on October 29, 1958 (order dated October 27, 1958, and filed October 29, 1958) denies priority to petitioner on petitioner's claim, on its merits, and petitioner files his notice of appeal on November 6, 1958, which notice specifically sets out that petitioner specifically appeals from both of said orders, and the appeal is perfected within the time provided by law, did the United States Court of Appeals properly dismiss the appeal and not decide the same on its merits?

4. Under Chapter XII of the bankruptcy laws, when the debtor defaults in the terms of the arrangement, and the court holds the plan has failed, does the court have the jurisdiction and power to immediately order the sale of the real estate and cause the same to be advertised and sold and distribute the proceeds of sale before it adjudges the debtor a bankrupt?

5. Where the petition for review was filed on February 16, 1954 (R. 47-49), one day after the original

time had expired, but within the extended time granted by the referee (R. 46-47) and the decisions of the various Courts of Appeals overwhelmingly hold that a petition for review is timely filed if filed within the extended time granted by the referee even though the extension is granted after the original time has expired, did the United States Court of Appeals properly arrive at the conclusion that "With the permission of the referee *an untimely petition for review was filed* but review was never had" (Emphasis ours).

6. Where a petition for review is timely filed and petitioner has requested the court to rule thereon, and there have been no intervening rights that have arisen since the petition was filed, and the court denies petitioner a review, did the United States Court of Appeals properly dismiss the appeal of petitioner without remanding it to the trial court for review or without deciding the appeal on its merits?

7. Where the law and the decisions of the State of Oklahoma and the decisions of the United States Court of Appeals, Tenth Circuit, when applied to the facts of the instant case, hold that petitioner has an equitable lien on the fund (J. C. Penney Company rent) and the trial court, in its order of October 22, 1958, and its order of October 29, 1958 (dated October 27, 1958), erroneously holds, contrary to the law and the decisions, that petitioner does not have an equitable lien, and a timely appeal is taken from said order, did the United States Court of Appeals properly dismiss the appeal without deciding the same on its merits?

8. Where a second petition for review is filed to review a particular order made by the referee, and there is pending at that time the first petition for review that has not been acted upon by the court concerning a prior order made by the referee, and the court, without having before it any of the papers, ex-

hibits and testimony if any, upon which the referee based his opinion or has no certified record from the referee, and the order on which the second petition for review is primarily based has in fact already been vacated by the referee, and the court does not purport to pass on the first petition for review but rules only on the second petition for review, without taking any evidence thereon, did the trial court properly overrule the second petition for review, not by written order but only by the minutes of the clerk, and was the Tenth Circuit in error when by inference it held that petitioner should have appealed from the order overruling the second petition for review when the offer of proof of petitioner (R. 70-71) shows petitioner did not know of the clerk's minutes or the order of the court?

TEXT OF THE APPLICABLE LAW

Chapter XII of the Act of Congress relating to Bankruptcy:

"Real Property Arrangements by Persons Other Than Corporations 11 U. S. C. A. 822. Same; original petition

"If no bankruptcy proceeding is pending, a debtor may file an original petition under this chapter with the Court which would have jurisdiction of a petition for his adjudication. July 1, 1898, c. 541, § 422, as added June 22, 1938, c. 575, § 1, 52 Stat. 918."

"11 U.S.C.A. 811. Exclusive jurisdiction of debtor and property.

"Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive juris-

diction of the debtor and his property, wherever located. July 1, 1898, c. 541, § 411, as added June 22, 1938, c. 575, § 1, 52 Stat. 917."

"11 U.S.C.A. 816. Appellate jurisdiction.

"Where not inconsistent with the provisions of this chapter, the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding. July 1, 1898, c. 541, § 416, as added June 22, 1938, c. 575, § 1, 52 Stat. 918."

Chapter XII. Real Property Arrangements:

"Title 11 U.S.C.A. Sec. 882 Termination or default after confirmation.

"Where the court has retained jurisdiction after the confirmation of an arrangement and the debtor defaults in any of the terms thereof or the arrangement terminates by reason of the happening of a condition specified in the arrangement, the court upon hearing after notice to the debtor, the creditors and such other persons as the court may direct shall—

"(1) where the petition has been filed under section 821 of this title, enter an order dismissing the proceedings under this chapter and adjudging the debtor a bankrupt and directing that the bankruptcy proceeding be proceeded with pursuant to the provisions of this title; or

"(2) where the petition has been filed under section 822 of this title, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this title or dismissing the proceedings under this chapter, whichever in the opinion of the court may be in the interest of the creditors. July 1, 1898, c. 541, § 482, as added June 22, 1938, c. 575, § 1, 52 Stat. 925."

"11 U. S. C. A. Sec. 47. Jurisdiction of Appellate Courts.

"(a) The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however*, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only; *And provided further*, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

"(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

"(c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted. July 1, 1898, c. 541, § 24, 30 Stat. 553; May 27, 1926, c. 406, § 9, 44 Stat. 664; June 7, 1934, c. 426, 48 Stat. 926; June 22, 1938, c. 575, § 1, 52 Stat. 854; June 25, 1948, c. 646, § 39, 62 Stat. 992; July 7, 1952, c. 579, § 9, 66 Stat. 423."

"42 Oklahoma Statutes Annotated § 15. Priority of Liens according to date.

"Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and *respondentia*. R.L. 1910 § 3836."

"42 Oklahoma Statutes Annotated, Sec. 6, Lien Created, how a lien is created:

"1. By contract of the parties; or,

"2. By operation of law. R.L. 1910, § 3827."

"42 Oklahoma Statutes Annotated, Sec. 8. Lien on future interest.

"An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest. R.L. 1910, sec. 3829."

"16 Oklahoma Statutes Annotated, Sec. 15: Necessity of acknowledgement and recording.

"Except as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease, or other instrument relating to real estate other than a lease for a period not exceeding one year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided. R.L. 1910, Sec. 1154."

STATEMENT OF THE CASE

The proceedings as to which review is sought, arose out of a proceedings for a real property arrangement under Chapter XII of the Act of Congress relating to bankruptcy. The debtor, LeRoy Milton Rauch, Sr., on May 14, 1953, filed in the District Court of the United States for the Western District of Oklahoma, his original petition in

proceedings for a real property arrangement under Chapter XII, 11 U.S.C.A., Sec. 822, together with his proposal for arrangement (R. 1-8). On the same date the court assumed jurisdiction and referred the same to the Honorable Paul G. Darrough, one of the referees in bankruptcy, to take such further proceedings therein as are required and permitted by Chapter XII (R. 8-9). The debtor was appointed as trustee and remained and was placed in possession of the real property by the referee. Various secured and unsecured creditors filed their claims, the only ones now pertinent to this appeal being the mortgage claim of Mutual Benefit Life Insurance Company (R. 13-18), the mortgage claim of R. Olsen (R. 9-11) now owned by Robert M. Barber, Florence G. McCaslin and B. D. Lack, trustee, the mortgage claim of E. E. Westervelt (R. 11-12) now owned by Raybourn H. Smiser, Sr., Raybourn H. Smiser, Jr., and Robert Emery Smiser, and the lien claims of W. C. Allred (R. 18-23), H. F. Bradburn (R. 24-25), and Arthur Fowler, Jr. (R. 27-30). The lien claim of H. F. Bradburn was assigned to W. C. Allred (R. 21) and to Arthur Fowler, Jr. (R. 26). Thereafter, W. C. Allred assigned his claim to Alice M. Hancock (R. 112-113) and thereafter Alice M. Hancock assigned her interest to Arthur Fowler, Jr. (R. 55-56) and Arthur Fowler, Jr., is now the owner of the entire interest in the lien claim.

Thereafter, in due course, the referee conducted various hearings on the various claims and allowed priority in the following order: Mutual Benefit Life Insurance Company, first mortgage, R. Olsen, second mortgage, and

E. E. Westervelt, third and fourth mortgages (these are the only mortgages involved in this matter) (R. 32).

The referee allowed the claim of Arthur Fowler, Jr., as a general claim, holding that it had no priority as a lien (R. 35-36).

Petition for review was timely filed by petitioner (R. 46-49).

This petitioner claimed priority over the mortgages or any other claim by reason of an equitable lien on the real estate or an equitable lien on the fund created by the payment of rentals by J. C. Penney Company, Incorporated, by reason of an agreement for commission (R. 19-20) between debtor and H. F. Bradburn. The interest of Bradburn is now owned in its entirety by this petitioner. The agreement was in writing, properly acknowledged and properly recorded in the office of the County Clerk of Oklahoma County. It recognized that Bradburn had secured J. C. Penney Company, Incorporated, as a tenant for debtor on a portion of the real estate involved in this action and agreed that in consideration of those services the debtor was to pay to Bradburn 5 per cent of all rentals paid by J. C. Penney Company, their successors or assigns, when and as the rentals were paid to debtor and further made provisions in the event the lease executed by J. C. Penney Company was cancelled prior to expiration, extended or renewed, and further provided the agreement between debtor Rauch and Bradburn was binding upon the heirs, executors, administrators and assigns of the parties. The real estate involved in this action was described in the agreement by its legal description, referred

to the lease executed by J. C. Penney Company on the property on June 20, 1947, referred to the length of time the lease was to run, to-wit, 20 years from March 1, 1949, with options and for additional space. It described the particular fund from which Bradburn was to be paid the 5 per cent. The agreement was properly recorded in the office of the County Clerk of Oklahoma County some two years and five and one-half months prior to the execution or recording of any mortgage involved herein. The J. C. Penney Company is still a tenant in the property under the lease.

While petition for review was pending, petitioner filed his motion for payment of commission (R. 49-51) re-asserting his priority, and thereafter filed his amendment to motion for payment of commission (R. 62-63).

Hearings on the merits on motion for payment of commission were held by the referee on July 15, 1955 (R. 96-109), August 9, 1955 (R. 110-115) and a subsequent hearing on October 23, 1957 (R. 57). While said motion was under advisement, awaiting the ruling of the referee, the referee on March 18, 1957, had overruled a motion of Raybourn H. Smiser, executor of E. E. Westervelt, deceased, to dismiss the petition of the debtor, LeRoy Milton Rauch, Sr., in the proceedings for a real property arrangement or adjudicate the debtor a bankrupt (appendix). Thereafter, within the extended time granted by the referee, the said Raybourn H. Smiser filed his petition for review for the purpose of reviewing this order.

A hearing on this petition for review was held by the court on September 5, 1958, and an order was entered and

filed on September 30, 1958 (R. 60-62). At the time of the entry of this order there was still pending the petition for review filed by this petitioner on February 16, 1954 (R. 47-49) which had not been acted upon by the court, and there was still pending a decision on the motion for payment of commission which had been heard by the referee on its merits and was awaiting the final decision of the referee.

These facts were brought to the attention of the court by proper motions filed September 15, 1958 (R. 57-59), and amended October 17, 1958 (R. 65), October 9, 1958 (R. 64), and October 17, 1958 (R. 64-65), and the priority of petitioner again asserted.

On October 22, 1958, the court rendered his decision on said motions (R. 66-68). This order, entered without the introduction of any evidence, in one paragraph held petitioner was guilty of laches and lost his right of review of the petition for review filed February 16, 1954 (R. 47-49), held in the next paragraph that a second petition for review, filed July 18, 1955 (R. 52-55), directed primarily at an order of the referee on July 11, 1955, which, unknown to petitioner had been vacated by the referee, was determined adversely to petitioner, and in the next paragraph held that a creditor is not entitled to a reconsideration of his claim if his claim has been denied an asserted priority, this paragraph being directed to petitioner's motion for payment of commission on the theory that the motion was in fact a motion to reconsider the original order denying priority, and then in the next two paragraphs the court proceeded to determine the merits of the priority claimed

by petitioner in the petition for review, the motion for payment of commsision and the motions filed before the court, adverse to petitioner.

Therefore, irregardless of the wording of paragraph two that stated petitioner was guilty of laches, paragraph three which discussed a separate and different petition for review, paragraph four that stated a creditor was not entitled to a reconsideration of his claim if his claim has been denied an asserted priority, the court, without a question of a doubt, squarely ruled in paragraphs five and six and the concluding paragraph on the question of whether or not this petitioner had a priority over the other creditors involved in this appeal whether or not it would be technically called a ruling on the merits on the petition for review to review the referee's orders of January 26, 1954, or would be called a ruling on the merits on the motion for payment of commission filed May 31, 1955, or would be called a reconsideration on its merits of a claim that had been denied an asserted priority. The question of priority was squarely before the court by reason of the motions heretofore referred to that were filed on September 15, October 9, and (two motions) October 17, 1958, and the court squarely ruled on the priority question on its merits.

Reference has heretofore been made to a hearing on September 5, 1958, on a petition for review filed by Raybourn H. Smiser on the order of the referee on March 18, 1957, denying the motion of Westervelt and Smiser to dismiss the petition of the debtor or adjudicate him a bankrupt. The motion on which the referee's order was based

was filed on October 5, 1954, by E. E. Westervelt, less than eight months after this petitioner's petition for review had been filed. Thereafter Smiser as executor of Westervelt filed a supplement to the motion and on July 11, 1955, the referee denied the motion to adjudge the debtor a bankrupt or dismiss the petition of debtor. Unknown to petitioner, this order was vacated on July 13, 1955, but the order itself (R. 51) and the order vacating (appendix) was not filed with the referee until August 5, 1955. This petitioner, feeling the order of July 11, 1955, was erroneous and that the petition of debtor should be dismissed or the debtor be declared a bankrupt, and not knowing the order had been vacated, filed a second petition for review, directed primarily at the order of July 11, 1955. The only record showing any action on this second petition for review is contained in the clerk's minutes, August 30, 1955 (R. 55) showing this petition for review assigned for hearing September 15, 1955, and the minutes on September 15, 1955 (R. 55), showing this petition for review overruled. No formal order was made or entered thereon. No papers, exhibits or testimony or certified record from the referee was before the court and no evidence was introduced, as far as is known by this petitioner, and petitioner did not know of the hearing, as shown by offer of proof (R. 70-71) and the order on which the petition for review was primarily directed had already been vacated by the referee. The minutes on this second petition for review did not pertain in any way to the first petition for review which was still pending. No further action was taken by the referee on the motion of Westervelt and Smiser to dismiss or adjudicate the debtor a bankrupt until one year and

eight months thereafter when on March 18, 1957, the referee overruled the motion of Westervelt and Smiser to dismiss or adjudge the debtor a bankrupt (appendix) resulting in the petition for review passed on by the court by a hearing on September 5, 1958, and reduced to formal order on September 30, 1958.

It was presumed by this petitioner that the only determination that would be made by the court at the hearing would be the questions presented in the petition, to-wit, whether or not the petition of the debtor for a real property arrangement would be dismissed or whether or not the debtor would be adjudicated a bankrupt. During the hearing the petitioner advised the court orally of his pending petition for review and of the motion for payment of commission and of the priority claimed by petitioner and was advised by the court that those matters would be considered at a later date. In open court at the hearing on September 5, 1958, the court remarked the debtor should be adjudicated a bankrupt and the property should be sold subject to first and second mortgage of record. Presuming the oral remarks of the court to be an order this petitioner on September 15, 1958, filed his motion for new trial or motion to vacate order or motion to modify order (R. 57-59) as amended October 17, 1958 (R. 65). However, the remarks of the court in actuality were not an official order, the official order being reduced to writing, dated and filed September 30, 1958 (R. 60-62). The order varied from the oral remarks of the court in that the debtor was not declared a bankrupt. However, the court did rescind the order referring the case to the referee, ruled the income from the real estate was insufficient

to meet the financial burdens of the arrangement, appointed E. R. Ledbetter as receiver, ordered the property sold on October 24, 1958, for cash, free and clear of any liens and encumbrances except the first and second mortgages and set the date of October 27, 1958, to hear the return of sale and motions to confirm sale and if sale confirmed direct receiver to execute deed and direct distribution of proceeds of sale; said order also set the above date to pass upon Smiser's motion to adjudge debtor bankrupt and that pending confirmation of sale, provided that lien rights of lien holders, other than holders of the first and second mortgages shall be transferred to the proceeds of sale, in accordance with the lien priorities *adjudged by the court upon confirmation of sale* (Emphasis ours). The motions of this petitioner heretofore referred to as filed on October 9 and (two motions) October 17, 1958, called to the attention of the court the lien priority of this petitioner and was further directed to the order of September 30, 1958.

Thereafter, the court entered the heretofore referred to order of October 22, 1958, denying this petitioner his asserted lien priority (R. 66-68). This petitioner then filed his motion to reconsider said order (R. 68-69) and his offer of proof (R. 70-71). The receiver, E. R. Ledbetter, conducted the sale of the real estate on October 24, 1958, and this petitioner, on October 27, 1958, filed his objection to confirmation of sale (R. 69). Thereafter, the court entered its order on October 27, 1958 (filed October 29, 1958) (R. 72-74), again denying priority to petitioner, confirming the sale, overruled objections of this petitioner

to confirmation of sale, ordered receiver to execute and deliver to Raybourn H. Smiser, Sr., a receiver's deed to the property free and clear of all encumbrances except as specified in the order of September 30, 1958 (first and second mortgage and rights of tenants in possession), overruled this petitioner's motion to reconsider and adjudged that Raybourn H. Smiser, Sr., as purchaser at the receiver's sale, acquired said property free and clear of all liens or encumbrances except first and second mortgage and rights of tenants in possession and restrained and enjoined all other persons from asserting any right, title or interest in or to said property adverse to the title of Raybourn H. Smiser, Sr., and ordered the proceeds of sale credited on the third and fourth mortgage of the purchaser; and further took under advisement the matter of adjudication of the debtor a bankrupt and the referral of this cause to the referee for further proceedings.

Timely notice of appeal was filed by this petitioner (R. 74), together with statement of points (R. 75-76) and within the time provided by law the appeal was filed in the United States Court of Appeals, Tenth Circuit, to review and set aside the orders and judgments of the trial court and the referee. The orders and judgments in question were rendered within the Tenth Circuit.

The jurisdiction of the United States Court of Appeals was invoked by the Act of Congress relating to bankruptcy, 11 U.S.C.A., Sec. 47.

The United States Court of Appeals for the Tenth Circuit heard oral argument on September 8, 1959, and dismissed the appeal by opinion and judgment on December

23, 1959. Petition for rehearing was timely filed and denied on January 15, 1960.

REASONS FOR ALLOWING THE WRIT

I.

The Writ should be allowed because the United States Court of Appeals has rendered a decision in conflict with the decisions of another court of appeals on the same matter.

Timely Filing of Petition for Review

The Court of Appeals held that with the permission of the referee an untimely petition for review (R. 47-49) was filed but review was never had. The overwhelming view of the authorities is that the referee may extend the time for filing petition for review even though application for extension is not made until the expiration of the original time.

—*Thummess* v. *Von Hoffman* (C.A. 3rd), 100 F.2d 291;

In re Albert (C.A. 2nd), 122 F.2d 393.

Therefore, the petition for review was filed within the extended time granted by the referee (R. 46-47) and was not untimely which brings the decision in this case in conflict with the decisions of another court of appeals.

The above decisions when applied to the facts of the instant case answer questions presented for review, No. 5, in that it is unquestioned that the petition for review was filed in the extended time granted by the referee (one day after the original time had expired) and was not untimely and the court did not properly dismiss the appeal.

Priority of Petitioner's Claim

The denial of priority of petitioner's claim is in conflict with the decision of another court of appeals on the question of priority.

—*Geddes* v. *Reeves Coal & Dock Co.* (C.C.A. 8), 20 F.2d 48, 54 A.L.R. 282, *certiorari denied*, 275 U.S. 556, 48 Sup. Ct. 117, 72 L. Ed. 424;

Union Trust Co. of Maryland v. *Townsend* (C.C.A. 4), 101 F.2d 903.

And is also in conflict with the decisions of the United States Court of Appeals, Tenth Circuit.

—*Underwood, et al.* v. *Phillips Petroleum Co., et al.* (C.A. 10), 155 F.2d 372;

Stone v. *Wright* (C.A. 10), 75 F.2d 457;

Mitchell v. *Bowman* (C.C.A. 10), 123 F.2d 445.

In *Geddes* v. *Reeves Coal & Dock Co.*, *supra*, the contract was that the Dock Company was to pay Geddes 50 per cent of any refunds received by it. The lower court sitting in equity appointed receivers of all property of the Dock Company to liquidate its obligations. The Eighth Circuit held the receiver took the property of the insolvent subject to the contract of Geddes and to his equitable lien of one-half of the fruits of any refunds recovered, holding that the receiver, when appointed, had no higher or better title or right in the claims for the refunds or proceeds than the Dock Co. had, and that when the refunds came to the receiver, the receiver became trustee to one-half of the funds for Geddes, stating:

"A contract under which one party is to receive compensation for services out of a particular fund, if and when realized, and which has been performed by such party, gives him an equitable lien on the fund when created in the hands of any one having notice of the contract."

In *Union Trust Co. of Maryland* v. *Townsend*, *supra*, the Second Circuit held:

"and the trustee in bankruptcy takes no better title to the property of the bankrupt than the bankrupt himself had, and takes it subject to equities that might be asserted against him. *Thompson* v. *Fairbanks*, 196 U. S. 516, 526, 25 S. Ct. 306, 49 L. Ed. 577; *Zartman* v. *First Nat. Bank*, 216 U. S. 134, 138, 30 S. Ct. 368, 54 L. Ed. 418; *Wiltshire* v. *Warburton*, 4 Cir., 59 F.2d 611."

In *Underwood, et al.* v. *Phillips Petroleum Co., et al.*, *supra*, the Tenth Circuit held:

"Under Oklahoma law, a contract under which one party is to receive compensation for services out of a particular fund if and when realized and which has been performed by such party is an equitable lien on the fund when created in the hands of any one having notice of the contract."

In *Stone* v. *Wright*, *supra*, Sunray Oil Corporation and Sunray Oil Company were placed in receivership. Prior to that time Reinhart & Donovan Company gave an oil and gas lease. Twyford & Smith, a partnership and A. D. Hudspeth claimed a one-fourth interest in the lease. Also prior to receivership, Sunray purchased interest of Twyford & Smith and Hudspeth for $25,000.00 in monthly payments

and 15,000 shares of stock which stock Sunray was to sell for the parties at the rate of 500 shares per month at $5.00 per share. Just before the receivership, Hudspeth sold his interest in the Sunray contract to Paul B. Stone. After the receivership was filed, Western Paving Company notified the receiver it had an assignment from Hudspeth for $10,000.00 to be paid from any money Hudspeth received from the production of oil and gas, said assignment ante-dating the sale to Sunray and placed of record before the sale. Twyford and Smith and Hudspeth had warranted title to Sunray. Stone apparently contended the assignment from Hudspeth to Western Paving Company was not binding on him as he had no actual notice thereof at the time he took his assignment and that the assignment to Western Paving Company did not fall under the recording statutes of Oklahoma so as to give him notice. The receiver contended that the assignment to Western Paving Company transferred an interest in real estate, which brought it within the recording statutes of Oklahoma, thus imputing notice to Stone. The Tenth Circuit held:

> "We do not so construe the assignment from Hudspeth to Western Paving Company. It does not purport to convey an interest in real estate and cannot be so applied. * * * However, we do construe it as creating an equitable lien on a fund to arise from the production of oil and gas to the extent and as limited therein * * *. The assignment to Western Paving Company being an equitable lien on the proceeds from the sale of oil produced to the extent of one-sixteenth of seven-eighths of the working interest made it an 'instrument affecting the real estate' from which the oil was taken, as used in said section 9689; and it was a 'contract

relating to real estate' as used in section 9672. Thus it was a proper instrument or contract to be placed of public record under the Oklahoma Statutes as provided in said sections, and having been so recorded notice of it was imputed to Stone. * * * The assignment to Western Paving Company was acknowledged and recorded as the statute requires and permits. It related to and affected real estate because the fund was to come from mineral extracted from the real estate, and it affected that real estate in many respects."

In *Mitchell* v. *Bowman, supra*, there was a question of priority between two conflicting claims to an impounded fund in bankruptcy. Jones, an architect, entered into a contract with Mitchell to solicit work for him on the basis of a division of fees received. Mitchell solicited and secured contracts for Jones. Jones borrowed money from a bank, pledging as security the proceeds from a contract that had been solicited and secured by Mitchell. The bank sold their note and collateral to Bowman. Subsequent thereto, Jones was adjudicated a bankrupt. The proceeds from the contract solicited and secured by Mitchell was deposited in the registry of the bankruptcy court. Mitchell and Bowman each asserted priority of right to the fund.

The Tenth Circuit held:

"Mitchell's compensation was to consist of a share of the money paid for the architectural services rendered by Jones under contracts secured in that manner. In other words Mitchell's compensation was contingent and was payable only out of the fund which he was to assist in bringing into existence. Jones was not obligated to pay him anything other than two-

thirds of such fund, but the contract expressly entitled him to that portion of it. It is the law in Colorado that a contract which constitutes a promise to pay one for services rendered out of a fund created in whole or in part by the efforts of the promisee creates a lien on the fund when it comes into existence, and that equity will enforce such lien. * * * It is readily manifest that Mitchell acquired and had a lien on the fund in question."

The above decisions and reasoning further answers questions presented for review, No. 7, by applying the law in these decisions to the facts in the instant case proves overwhelmingly that petitioner was entitled to an equitable lien on the J. C. Penney Company rent that was enforceable as against all subsequent lien holders and that the referee and trial court erroneously denied this petitioner his priority and that the Tenth Circuit did not properly dismiss the appeal.

II.

The Writ should be allowed because the United States Court of Appeals has decided an important question of Federal law which has not been, but should be settled by this Court.

Title 11, U.S.C.A., Jurisdiction, Sec. 882, provides:

"Where the court has retained jurisdiction after the confirmation of an arrangement and the debtor defaults in any of the terms thereof * * * the court upon hearing after notice to the debtor, the creditors and such other persons as the court may direct shall—

* * * * * * *

"(2) where the petition has been filed under section 822 of this title, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this title or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors."

In this instance the trial court neither adjudged the debtor a bankrupt nor dismissed the proceeding. Ignoring the command of the above statute, the trial court sold all of the property of the debtor, ordered delivery of a receiver's deed to the property free and clear of all encumbrances except first and second mortgages and rights of tenants in possession, ordered distribution of proceeds of sale and took under advisement the matter of adjudication of the debtor a bankrupt and referral of the cause to the referee for further proceedings (R. 72-74). Not until July 10, 1959, some eight and one-half months after all assets of the debtor had been sold and distributed did the court adjudge the debtor a bankrupt.

It is the position of this petitioner that the above law is mandatory and that the use of the word *shall* is a command that could not be ignored by the court and would limit its jurisdiction so that it must adjudge the debtor a bankrupt before selling all of the assets of the debtor or that it must dismiss the proceedings which would place all parties in the same position they were in prior to the proceedings and that as a result thereof beginning with the order of September 30, 1958, that order and all subsequent orders would be void on their face and the court without

jurisdiction to make them and that this jurisdictional question could be raised at any point in the proceedings. This jurisdictional point was first raised by this petitioner in his reply brief filed with the United States Court of Appeals on September 8, 1959.

Petitioner has been unable to find any decisions of this Court wherein this important question of federal law has been settled. Neither can he find where this question has been settled by any court of appeals of any circuit. It is a question of great importance in the orderly administration of bankruptcy proceedings, in this case involving real estate appraised in value of over one million dollars, and is a question that should be settled by this Court.

Manner of Review.

On July 11, 1955, the referee entered his order denying the motion of Raybourn H. Smiser to adjudicate the debtor a bankrupt or dismiss the proceedings. Unknown to this petitioner, this order was vacated on July 13, 1955, but the order vacating was not filed until August 5, 1955. Not knowing the order had been vacated, this petitioner, on July 18, 1955, filed in the United States District Court a petition for review (R. 52-55) directed primarily at the order of July 11, 1955, which had been vacated, but again raising his lien priority. On September 15, 1955, unknown to petitioner at the time, and without any record being certified to the court by the referee, and without any papers, exhibits or testimony being before the court, the court overruled the petition for review, not by written order but the action of the court being shown only by the

clerk's minutes (R. 55). Note: This was not the petition for review filed February 16, 1954.

The question of the jurisdiction of the court to pass on a petition for review of the referee's orders before he has before him all the papers, exhibits and testimony if any, upon which the referee based his opinion or has a certified record from the referee, or to pass on a petition for review on a question which has not been disposed of by the referee (which in this case the order on which the petition for review was filed had been vacated by the referee two days after it was rendered and was not finally disposed of until March 18, 1957, as shown in appendix), has, as far as can be determined by petitioner, not been settled by any of the circuit courts or by this Court.

It has been passed on by various United States District Courts.

—*In re Klein's Outlet, Inc.*, D.C., S.D., N.Y., 49 F. Supp. 375;

In re Mt. Jessup Coal Co., Limited, D.C., M.D., Pa., 7 F. Supp. 603;

In re Peterson, D.C., D., Nev., 252 Fed. 846;

In re Stucky Trucking & Rigging Co., D.C., D., N.J., 240 Fed. 427.

The question of whether or not the court has jurisdiction to determine the merits of a petition for review of the referee's orders before he has before him all the papers, exhibits and testimony if any, upon which the referee based his opinion or has a certified record from the referee, or to pass on a petition for review on a question which has

not been disposed of by the referee, all without taking evidence on the petition for review, is a question of great importance in the orderly administration of bankruptcy proceedings and is a question that should be settled by this Court. The various United States District Courts, in the opinions above cited, hold that the court does not have the jurisdiction to hear and determine the petition for review until it has the record before it and cannot pass on a petition for review on a question which has not been disposed of by the referee. These opinions are not binding on this Court or on the various circuit courts.

If this Court passes on the jurisdictional question presented herein, questions presented for review, No. 4, will be answered. If this Court rules the provisions of Section 882 are mandatory, the United States Court of Appeals could not properly dismiss the appeal of this petitioner without deciding the same on its merits.

If this Court passes on the manner of review and holds that the court cannot properly deny a petition for review before it has before it all the papers, exhibits and testimony if any, upon which the referee based his opinion or has no certified record from the referee, then it was error for the trial court and the United States Court of Appeals to even consider the second petition for review filed by petitioner directed at the order of July 11, 1955, and will answer questions presented for review, No. 8, wherein the trial court and the Tenth Circuit considered that that particular petition for review had been overruled on its merits, and by reason thereof the Tenth Circuit improperly dismissed the appeal of petitioner.

III.

This Writ should be allowed because the United States Court of Appeals has decided a Federal question in a way in conflict with applicable decision of this Court.

Timely Filing of Petition for Review

The Court of Appeals held that with the permission of the referee an untimely petition for review was filed but review was never had. As pointed out in the preceding reasons No. 1, the overwhelming view of authorities is that the referee may extend the time for filing petition for review even though application for extension is not made until the expiration of the original time. The decisions of other circuits was cited in No. 1. This view is also sustained by this Court.

—*Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 150, 87 L. Ed. 146, 151, 63 Sup. Ct. 133.

Priority of Petitioner's Claim

In dismissing the appeal, the Court of Appeals in effect affirmed and sanctioned the orders and judgment of the trial court and the referee in denying priority to this petitioner. The denial of priority is in conflict with applicable decisions of this Court.

—*Zartman* v. *First National Bank of New York*, 30 Sup. Ct. 368, 54 L. Ed. 418;

Thompson v. *Fairbanks*, 25 Sup. Ct. 306, 196 U.S. 516, 526, 49 L. Ed. 577;

Barnes v. *Alexander*, 232 U.S. 117, 34 Sup. Ct. 276; 58 L. Ed. 530.

This same proposition has been discussed under No. 1 involving conflict with other circuits.

Right to Review Claim

In dismissing the appeal, the Court of Appeals in effect affirmed and sanctioned the order of the trial court that a creditor is not entitled to a reconsideration of his claim by the referee if his claim has been denied an asserted priority and the referee has no power to do so, and in effect holding that the trial court had exercised his discretion in so ruling. The United States Court of Appeals in this case did hold that a referee in bankruptcy has the power on reconsideration to correct an order adjudicating a claim but failed to find that the trial court, in holding the referee did not have the power to reconsider, did not exercise his discretion, which is in conflict with the applicable decision of this Court.

—*Pfister* v. *Northern Illinois Finance Corporation*, 317 U.S. 144, 150, 87 L. Ed. 146, 151, 63 Sup. Ct. 133.

If this Court rules the petition was timely filed within the extended time granted by the referee, it will provide the answer to questions presented for review, No. 1 and petitioner would be entitled to a hearing on the merits of his petition for review and the Circuit Court could not properly dismiss the appeal without deciding the same on its merits.

In ruling on priority of petitioner's claim by applying the law as set out in the foregoing decisions of this Court, in particular the case of *Barnes* v. *Alexander*, *supra*, this

Court is supplied with a further answer to questions presented for review, Nos. 2, 6 and 7 that has already been discussed in reasons for allowing the writ, No. 1. The law in the *Barnes* case, when applied to the facts in the instant case gives most excellent reasoning as to why this petitioner is entitled to an equitable lien in the J. C. Penney Company rent. It follows therefrom that the Tenth Circuit did not properly dismiss the appeal of petitioner without deciding the same on its merits.

IV.

This Writ should be allowed because the United States Court of Appeals has so far departed from the accepted and usual course of proceedings, or so far sanctioned such a departure by the United States District Court for the Western District of Oklahoma and the referee thereof, as to call for an exercise of this Court's power of supervision.

Right to Review

The petitioner has an inherent right to a review of the petition for review filed February 16, 1954. This is a proceeding for a real property arrangement. Under most favorable conditions and the most optimistic reasoning, the plan approved by the referee would have required at least twenty years to pay out. No change of condition did or could occur that would affect the lien priorities of any of the parties between the time the petition for review was filed on February 16, 1954, and the date of October 22, 1958, when the District Court held that petitioner was not entitled to a hearing on his petition for review because of laches. This conclusion of the court was arrived at without the introduction of any evidence. The record

negatives the finding. This petitioner, while awaiting a hearing on the petition for review, filed on May 31, 1955, his motion for payment of commission (R. 49-51). Three separate hearings were held by the referee on this motion, July 15, 1955, August 9, 1955 and October 23, 1957. Nothing remained to be done on this motion except for the referee to rule thereon. A favorable ruling to petitioner would have eliminated the necessity for a ruling on the petition for review. All parties, including this petitioner and the respondents herein, were hopeful that the debtor would be able to refinance the property and pay all of the creditors. The debtor and the referee were optimistic that this could be done. The principal respondent herein, Raybourn H. Smiser, Sr., although not particularly optimistic that the property could be refinanced, was not particularly pressing for a speedy determination of his rights to have the debtor declared a bankrupt or dismiss the proceedings. The original motion on which the plan was finally terminated on September 30, 1958, was filed on October 5, 1954, by the principal respondent herein, less than eight months after this petitioner's petition for review had been filed. This motion was initially ruled on by the referee on July 11, 1955, vacated July 13, 1955 and finally ruled on by the referee on March 18, 1957 and petition for review based thereon heard by the court on September 5, 1958 and covered by order dated September 30, 1958.

The ruling by the District Court that petitioner was guilty of laches while holding that the principal respondent was entitled to the relief sought, when the pleadings on which relief was sought had been filed less than eight

months apart was so far a departure from the accepted and usual course of proceedings as to call for an exercise of this Court's power of supervision, especially since subsequent to the filing of the petition for review by petitioner and the filing of the motion of the respondent Smiser to adjudicate the debtor a bankrupt or dismiss the proceedings, the petitioner had filed a motion for payment of commission, had three hearings thereon on its merit and was awaiting the decision of the referee at the time the order of reference was rescinded by the court.

V.

This Writ should be allowed because the United States Court of Appeals, in dismissing the appeal, has in effect affirmed, sanctioned and decided an important State question in a way in conflict with applicable State law.

In passing on priorities, the bankruptcy court is bound by the applicable statutes and decisions of the state in which the property is located. In the instant case, all of the real estate was located in Oklahoma County, State of Oklahoma. The agreement for commission was made in Oklahoma County, enforceable in Oklahoma County, payable in Oklahoma County, payable out of the income of the real estate located in Oklahoma County and properly filed of record in the office of the County Clerk of Oklahoma County on June 11, 1948. Some two years five and one-half months later, on November 28, 1950, the debtor executed and delivered the mortgage to Mutual Benefit Life Insurance Company. Subsequent thereto the debtor executed and delivered the mortgage to R. Olsen on November 23, 1951 and on November 30, 1951, the

debtor executed and delivered the mortgage to E. E. Westervelt. All mortgages were filed of record in the office of the County Clerk of Oklahoma County on the approximate date they were given. By this petitioner having properly filed his agreement for commission some two years five and one-half months prior to any mortgage involved herein, all mortgagees had actual knowledge of the agreement for commission (R. 19-20) which provided that the debtor would pay to H. F. Bradburn five per cent of all moneys received from the J. C. Penney Company, Incorporated, as rental on the property involved herein, said commission to be paid when and as the rental was received by the debtor. This petitioner is by assignment the owner of the entire interest of H. F. Bradburn in the agreement for commission. The agreement further provided that it shall be binding upon the heirs, executors, administrators and *assigns* of the parties thereto (Emphasis ours).

The denial of priority on the fund, to-wit, the J. C. Penney Company rent, by the referee and by the District Court, was not only in conflict with the applicable decisions of the United States Court of Appeals, Tenth Circuit, and in conflict with the decisions of another court of appeal on the same matter as has been set out under reason No. 1 and in conflict with the applicable decision of the Supreme Court of the United States as has been set out under reason No. 3, but the decision is in direct conflict with the applicable State law and decisions.

"42 Oklahoma Statutes Annotated, Section 15. Priority of Liens According to Date.

"Other things being equal, different liens upon the same property have priority according to the time of

their creation, except in cases of bottomry and *respondentia*. R.L. 1910 Sec. 3836."

and

"42 Oklahoma Statutes Annotated, Sec. 6. LIEN CREATED, how

"A lien is created:

"1. By contract of the parties; or.

"2. By operation of law. R.L. 1910, § 3827."

and applicable State decisions:

—*Davis* v. *Lewis*, 187 Okla. 91, 100 P.2d 994;

Clark v. *Armstrong & Murphy*, 180 Okla. 514, 72 P.2d 362;

Pauly, et ux. v. *Pauly, et ux.*, 198 Okla. 156, 176 P.2d 491.

All of the above decisions together with the decisions of the United States Court of Appeals, Tenth Circuit, other Circuit Courts and this Court, when applied to the facts in this case, give to this petitioner an equitable lien in the J. C. Penney Company fund that cannot be defeated by the sale of the real estate involved. Respondents have contended that the agreement for commission was merely a personal obligation of the debtor, even though the agreement specifically provided it was binding on the assigns of the debtor, because the agreement provided that debtor would pay:

"five percent *of* all moneys received"

instead of providing that debtor would pay:

"five percent *out of* all moneys received"

Respondent's have to this date cited no Oklahoma decisions, Tenth Circuit or other Circuit Court or United States Supreme Court decisions upholding this contention. To the contrary, however, the *Pauly* case, *supra*, involved a contract that had the identical use of the word "of" as it was used in the contract at issue, wherein the *Pauly* contract provided:

> "We hereby agree to remit annually one third *of* royalty payments received * * *" (Emphasis ours).

The Supreme Court of Oklahoma held in the *Pauly* case that a written instrument plainly making an appropriation of a fund constitutes an equitable assignment thereof.

The use of the word *of* was further upheld by the Eighth Circuit in the *Geddes* case (*supra*, reason No. 1) wherein the contract provided:

> "We agree to pay George E. Geddes fifty (50) per cent *of* any refunds received by us from overcharges * * *" (Emphasis ours).

The Eighth Circuit held this created an equitable lien on the fund.

The use of the word *of* was further upheld by this Court in the *Barnes* case (*supra*, reason No. 3) wherein the lien was dependent on an oral conversation which was:

> "If you will attend to this case I will give you one third *of* the fee which I have coming * * *" (Emphasis ours).

This Court held this created an equitable lien on the fund.

The use of the word *of* was used by the Tenth Circuit in the *Mitchell* case (*supra*, reason No. 1) wherein in the language of the Court it was said:

> "Jones was not obligated to pay him anything other than two-thirds *of* such fund, but the contract expressly entitled him to that portion *of* it" (Emphasis ours).

The Tenth Circuit held this created an equitable lien on the fund.

The other cases cited in this reason and reasons No. 1 and 3 were cases wherein the words *out of* were mostly used. No distinction by the courts was made or required from those cases to determine whether the word *of* would have had the same meaning as the words *out of*. However, the same conclusion was reached in cited cases wherein the word *of* was used as in the cases where the words *out of* were used. The *Barnes* case (*supra*, reason No. 3) decided by this Court uses most convincing reasoning where the word *of* is used.

The Supreme Court of Florida, while their decisions are in no way binding on this Court or the Tenth Circuit or the Oklahoma courts, have written very learned decisions involving the use of the word *of*, which, as in the *Barnes* case decided by this Court, gives very good reason-

ing in ruling that the word *of* gave the debtor the right in equity to share in a particular fund.

—*Moss* v. *Sperry*, 140 Fla. 301, 191 So. 531, 125 A.L.R. 909;

Broome, as Adm'r v. *Bisbee*, 14 Fla. 21.

The number of bankrupt petitions being filed has been growing steadily from year to year. In particular, under Chapter XII involving real property arrangements, there are principles of great importance to the public which need to be settled by this Court. Otherwise, the purchaser of real property, purchasing at judicial sale from the receiver, will be unable to determine whether or not he is receiving a good and merchantable title to the real estate and as a result of this uncertainty the purchaser will be hesitant to bid an amount close to the fair appraised value of the property for fear his title will prove to be unsound. A perfect example is the instant case wherein the property was bid in for approximately $250,000.00 under the lowest appraisal. This not only prevents the receiver from receiving a fair bid on the property but it prevents the creditor from realizing the fullest amount possible on his claim.

Not only are there principles of great importance to the public which need to be settled by this Court, but there are real and embarrassing conflicts of opinion between Courts of Appeal that are of great importance to the public that need to be settled by this Court.

Unless this Court allows the Writ of Certiorari, these principles of great importance to the public, affecting title

to real estate to the end of time, will remain unanswered and the purchaser of real estate at judicial sale under chapter twelve of the bankruptcy laws will never be secure in his title to the real estate.

Respectfully submitted,

RUTH E. MORAN, and
JOHN C. MORAN,
915 Leonhardt Building,
Oklahoma City, Oklahoma,
Attorneys for the Petitioner.

April, 1960.

APPENDIX

Order Vacating

Now on this 13th day of July, 1955, pursuant to the oral request of the said Raybourn H. Smiser, executor of the estate of E. E. Westervelt, deceased, through his attorney, Howard Hopps, the orders heretofore made in this cause on July 11, 1955, overruling the motion to dismiss and the motion to adjudicate the debtor a bankrupt are hereby vacated and set aside and held for naught.

/s/ Paul G. Darrough,
Paul G. Darrough,
Referee in Bankruptcy

Filed August 5, 1955

Order

Now on this the 18th day of March, 1957, the motion to dismiss filed by Raybourn H. Smiser, Executor of E. E. Westervelt, deceased, is hereby overruled and exceptions are allowed, and the time is hereby extended to April 26, 1957 in which to file a petition for review.

/s/ Paul G. Darrough,
Paul G. Darrough,
Referee in Bankruptcy

Filed June 10, 1957

The preceding order, corrected by order *nunc pro tunc* to read as follows:

* * * * * * *

"Now on this the 18th day of March, 1957, the motion to dismiss and the motion to adjudge debtor bankrupt filed by Raybourn H. Smiser, executor of

E. E. Westervelt, deceased, are hereby overruled and exceptions are allowed and the time is hereby extended to April 26, 1957, in which to file a petition for review."

* * * * * * *

/s/ Paul G. Darrough,
Paul G. Darrough,
Referee in Bankruptcy

Filed August 2, 1957

NOTE: At the time of filing this appeal it was not anticipated the three preceding orders were material to a determination of the appeal and were not ordered by appellant as a part of the record. However, when the United States Court of Appeals handed down its decision in this case, it became apparent that the orders should become a part of the record. Accordingly, this petitioner, in his petition for rehearing, requested the Court of Appeals, under Rule 16 of the Court, to have the above instruments brought before the Court. In denying the petition for rehearing, the Court made no comment on said request. The pertinent part of the request, appearing on page six of the petition for rehearing and attached to the certified transcript of the record prepared by the clerk of the United States Court of Appeals, is as follows:

"* * * it is requested that this Court, under Rule 16 of this Court, have the above instruments brought before this Court as a part of the record, at the cost of appellant * * *."

The originals of the above orders are on file in the office of the clerk, United States District Court for the Western District of Oklahoma and it is requested that this Court have the same brought before this Court as a part of the record, at the cost of petitioner.

Before BRATTON, LEWIS and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

In this bankruptcy proceeding the controversy relates to the denial of priority to the claim of appellant Fowler over certain mortgages. At the outset we are met with procedural difficulties affecting the right of Fowler to have such issue considered on this appeal.

The bankrupt, Rauch, was engaged in an Oklahoma City real estate development. As a commission for work performed by one Bradburn to obtain J. C. Penney Company as one of the tenants in this development, Rauch agreed in writing to pay to Bradburn "five per cent of all moneys received from the J. C. Penney Company." The agreement was duly recorded with the county clerk before mortgages totaling over $1,000,000 were recorded. In May, 1953, Rauch filed a petition for a real property arrangement under Chapter XII of the Bankruptcy Act. Fowler has succeeded to the rights of Bradburn.

The claim of Fowler and the objections of the mortgagees thereto were heard by the referee in July, 1953. On January 26, 1954, the referee entered an order allowing the claim of Fowler but denying it priority over the mortgages. With the permission of the referee an untimely petition for review was filed but review was never had. There is no intimation in the record that the referee ever furnished, or that Fowler ever requested the referee to furnish, to the district court the certificate and other papers required by § 39(a)(8) of the Bankruptcy Act[1] for consideration of a petition for review. That order stands as the final determination of the rights of the parties unless

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[1] 11 U.S.C. § 67(a)(8).

Fowler's later efforts to obtain reconsideration have kept alive his right to review.

Section 2(2) of the Bankruptcy Act[2] empowers a bankruptcy court to "reconsider allowed or disallowed claims." Section 57(k) of the same act[3] provides that at any time before an estate has been closed allowed claims "may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case." General Order 21 (6) states that when the trustee, a creditor, the bankrupt, or a debtor desires the reconsideration of a claim allowed against an estate, he may petition the referee for an order for such reconsideration. While *In re Jayrose Millinery Co.*, 2 Cir., 93 F.2d 471, 474-475, holds that the authorized procedures are to protect the estate against claims which have been erroneously allowed and are not available to a creditor whose claim has been denied or limited, we think that these remedial provisions should not be narrowly construed and that *Castaner* v. *Mora*, 1 Cir., 234 F.2d 710, 714, rightly held that "a referee in bankruptcy has the power on reconsideration to correct an order adjudicating a claim."

On May 31, 1955, Fowler filed with the referee what is entitled "Motion for Payment of Commission", asserting that the commission agreement had priority over the mortgages. Hearings, the natures of which are not clearly defined in the record, were held on July 15 and August 9, 1955, and on October 23, 1957. No ruling on the motion appears in the record. There was no order for reconsideration as contemplated by General Order 21 (6), no grant of a rehearing, and no action indicating an intent by the referee to reconsider or rehear. Hence, these proceedings left the January 26, 1954, order effective and unchanged.

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[2] 11 U.S.C. § 11(2).

[3] 11 U.S.C. § 93(k).

Fowler, on July 18, 1955, filed a petition for review of a prior confirmation of an arrangement proposed by the Chapter XII petitioner and therein again asserted the priority of his claim. This petition was denied on September 15, 1955; and no appeal taken.

Next, we have filed by Fowler, on September 15, 1958, a document entitled "Motion for New Trial or Motion to Vacate Order or Motion to Modify Order," in which Fowler renewed his assertion of the priority of his claim. The trial court, on September 30, 1958, on a petition for review presented by other creditors revoked the reference, appointed a receiver, and ordered the property sold. This was followed by more motions from Fowler all going to the priority question. These were denied on October 22, 1958, and were followed by a motion to reconsider, objections to the confirmation of sale of the property, and a written, unverified and unsupported offer of proof. These were all rejected on October 27, 1958, and this appeal was then taken.

The September-October, 1958, motions and applications amounted to no more than an effort to obtain a reconsideration or rehearing of either the referee's January 26, 1954, order denying the priority or the court's September 15, 1955, order denying the petition for review of the referee's action in this regard.

Wayne United Gas Co. v. *Owens-Illinois Glass Co.*, 300 U.S. 131, 137, lays down the rule that in bankruptcy proceedings a court "in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action" may grant an application for rehearing diligently made with the result that time for review runs from the disposition of the rehearing. Here the applications of September-October, 1958, came over four and a half years after the referee's order denying the priority and three years after the court's denial of Fowler's petition for re-

view. The lack of diligence is unexplained. There were adequate grounds, amply supported by the record, to sustain the discretionary power of the court to reject the various motions, objections and offers. The result was a denial of reconsideration or rehearing. In *Conboy* v. *First National Bank of Jersey City*, 203 U.S. 141, 145, a bankruptcy case, it was held that no appeal lies from an order denying a petition for rehearing.[4]

The trial court found that there were no grounds for the reexamination of the original orders. The hearing upon, or examination of the grounds for, allowing a reconsideration or rehearing does not enlarge the time for review of the original orders because of the well-established rule that "where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended."[5]

The appeal is dismissed.

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[4] See also *In re Marachowsky Stores Co.*, 7 Cir., 188 F.2d 686, 689, *certiorari denied* 342 U.S. 822. *Cf. Kanaster* v. *Chrysler Corp.*, 10 Cir., 195 F.2d 104, 105, *certiorari denied* 344 U.S. 921.

[5] *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 150.

JUDGMENT

Twentieth Day, November Term, Wednesday, December 23rd, 1959.

Before Honorable Sam G. Bratton, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the appeal in this cause be and the same is hereby dismissed out of this court.

It is further ordered that the clerk of this court forthwith transmit to the clerk of the United States District Court for the Western District of Oklahoma a certified copy of this order.

On December 28, 1959, a certified copy of the Order dismissing the appeal was mailed to the United States District Court.

Order: Appellant's petition for rehearing — denied Eighth Day, January Term, Friday, January 15th, 1960. Before Honorable Sam G. Bratton, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.